



Considerations When Bringing on a New Owner

A PilieroMazza Webinar

November 29, 2017

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Overview

- The decision to bring on a new owner
- Required approvals and/or notifications
 - When?
 - To/from?
- Amending the governing documents
- Small business ownership and control requirements
 - 8(a)
 - SDVOSB
 - WOSB
- Planning for a smooth exit strategy

Why Would I Want to Bring on a New Owner?

- Raise Capital
- Reward Employee
- Other Considerations –
 - Affiliation concerns?
 - Is the new owner an individual or an entity?
 - How much ownership are you giving up?
- Do I have to give up ownership in my company?
 - Debt – getting loan without giving ownership
 - SBA business loan program
 - Phantom stock

Due Diligence – Approvals and/or Notifications

- Now that you've made the decision to bring on a new owner, what's next?
- Look at all contracts for notifications or approval requirements
 - FAR 52.215-19
- What if the new owner is a foreign entity?

Due Diligence – Approvals and/or Notifications

- If 8(a), must get SBA approval beforehand
- If CVE verified SDVOSB:
 - Substituting one veteran for another?
 - Must file new application after change in ownership
- HUBZone firms should notify SBA of the material change
- Self-certified WOSB should upload new ownership documents to www.certify.sba.gov
 - Coming soon: no WOSB self-certification

Does the Ownership Change Trigger Recertification?

- SBA regulation states that recertification is required when small business acquires or is acquired by “another concern”
 - No requirement if individual is acquiring ownership
- How much ownership change requires recertification?

Amending the Governing Documents: Staying Compliant

- With any new owner, the governing documents must be amended
- Amended operating agreement or bylaws must comply with the regulations governing SBA/VA contracting programs
 - 8(a)
 - SDVOSB
 - WOSB
- Coming soon – 2017 NDAA

Unconditional Ownership by Qualifying Owner

- At least 51% ownership
 - Limited liability company v. corporation
- Cannot be subject to any conditions
 - For example, qualifying owner must be able to transfer interest whenever, and to whomever
 - Right-of-first-refusal
 - Tag-along rights
- Entitlement to dividends and distributions

Unconditional Ownership by Qualifying Owner

- Day-to-day management
- Long term decision-making
- Limited liability company?
 - Qualifying owner must serve as the managing member with control over all company decisions
 - All means all
- Corporation?
 - Qualifying owner must control the Board of Directors
 - How does the qualifying owner control the Board of Directors?
- Other considerations?

No Negative Control

- What is negative control?
- Negative control provisions are problematic
 - Pay careful attention to quorum and voting requirements
- Currently, virtually no protections for minority investor/owner

Amending the Governing Documents: Corporate Considerations

- Protecting the company and qualifying owner
- Always a possibility that the relationship with the new owner will be severed down the road
- Planning for a smooth exit strategy

Business Divorce: Dissociation

- Gives the company and/or remaining member the right to buy out the other member's interest if dissociated
- Member withdrawal permitted?
- Operating agreement/bylaws should spell out triggering events
- Controllable triggering events
 - Termination for cause
 - Bankruptcy of a member
- Uncontrollable triggering events
 - Death
 - Disability
 - Termination without cause

Business Divorce: Determining Purchase Price

- How do you determine the buy out price?
- Price could vary between controllable and uncontrollable triggering events
 - Controllable? Book value or percentage of fair market value
 - Uncontrollable? Fair market value
- How to determine fair market value?

Business Divorce: Payment Terms

- The operating agreement or bylaws should set forth the payment terms
 - Cash
 - Promissory note
 - Combination
- Key man insurance
 - What is it?
 - Why have it?

QUESTIONS?

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